STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 22, 2014

In the Matter of McCollough/Gallentine, Minors.

No. 318140
Livingston Circuit Court
Family Division
LC No. 2012-014136-NA

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to her children under MCL 712A.19b(3)(c)(*i*), (g), and (j). Because the trial court's evidentiary decisions were not an abuse of discretion and there was clear and convincing evidence supporting statutory grounds for termination, we affirm the trial court's order in these regards. However, we vacate the trial court's best interest analysis and remand for further consideration of this issue in light of the children's placement with their maternal grandmother.

In May 2012, respondent noticed multiple bruises on her infant daughter (DOB 1/13/12), and suspected that her boyfriend, the child's father, had abused the baby. Respondent secured a personal protection order against this man; nevertheless, within a few days, respondent allowed this same man to be in a car with her, the infant, and respondent's other daughter (DOB 8/26/10). At that point, the children were removed from respondent's care, and she was ordered to participate in services, from which she benefitted only marginally. As a result of his abuse of the infant, the baby's father pled guilty to third degree child abuse and spent time in jail. Credible evidence suggests that respondent continued to have contact throughout this case with the man who had abused her child.

Pursuant to MCL 712A.19b and MCR 3.977, to terminate parental rights, a court must find clear and convincing evidence that one or more of the statutory criteria for termination have been met. *In re Rood*, 483 Mich 73, 101; 763 NW2d 587 (2009). On appeal, we review for clear error the trial court's factual findings in order to terminate parental rights. See MCR 3.977(K); *In re Rood*, 483 Mich at 90. '"A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.'" *In re Rood*, 483 Mich at 91, quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We must give regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). "Only one statutory ground need be established by clear and convincing

evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *Id.* at 32.

To terminate parental rights, the court must also make a finding that termination is in the child's best interests. MCL 712A.19b(5). "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

Respondent first argues that the trial court erred in allowing a caseworker to testify regarding out-of-court statements made by a probation officer and in allowing the same caseworker to testify about a photograph not introduced into evidence during the termination proceedings. In particular, respondent alleges that the probation officer's statements were inadmissible hearsay and that the caseworker's comments on the photograph violated MRE 1002. The Michigan Rules of Evidence, other than those regarding privileges, do not apply to termination of parental rights hearings. MCR 3.977(H)(2). In this case, however, respondent asserts that termination was based on circumstances that were "new or different" from the offense originally leading to jurisdiction, meaning that, pursuant to MCR 3.977(F), these circumstances could be proved only with legally admissible evidence. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Where evidentiary decisions involve preliminary questions of law, we review those issues of law de novo. *Id.* It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* We review de novo a trial court's interpretation of statutes and court rules. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

Contrary to respondent's argument, MCR 3.977(F) does not apply, and the cases she cites are not applicable to the present case. Respondent cites *In re Gilliam*, 241 Mich App 133; 613 NW2d 748 (2000), in support of her position that there were new and different allegations, thus triggering the applicability of MCR 3.977(F). However, *Gilliam* is distinguishable from the present case. In *Gilliam*, the initial allegations were that the children were left home alone and a fire occurred, thus endangering their lives. Later a supplemental petition was filed in which allegations were made that the child's father had tested positive for illegal substance abuse on numerous occasions. Accordingly, the supplemental allegations in *Gilliam* were indeed new and entirely different. As such, in *Gilliam*, it was appropriate to proceed in keeping with MCR 3.977(F) and to require proof by legally admissible evidence. *Gilliam*, 241 Mich App at 135-138.

However, MCR 3.977(F) was not applicable in the present case because the allegation that respondent allowed her abusive former boyfriend to have contact with the children in December 2012 did not constitute "new or different" circumstances. Rather, the allegation that respondent allowed her abusive former boyfriend to have contact with the children constituted merely another example of respondent's violation of previous orders that she, and her children, have no contact with this man. Just as respondent failed to protect her children from this man in May 2012, only days after he had abused their infant child, the allegations were that respondent continued to fail to protect her children in December 2012 by again exposing them to the same abusive individual. On both occasions, respondent was aware of orders to have no contact with

this man, and she was aware of the potential danger he posed to her children. Thus, far from "new and different," the allegations regarding respondent's conduct in December related to a perpetuation of the circumstances which had endangered her children in May and which led to the trial court's initial assumption of jurisdiction. That respondent persisted in violating the PPO was also confirmed by testimony from the baby's father, who admitted that he had contact with respondent in December of 2012, resulting in him violating his probation and being returned to jail. Indeed, the allegation regarding his conduct in December can be seen as simply showing a lack of benefit from services offered by petitioner. On these facts, respondent's argument that the allegations of failure to protect the children in December 2012 were actually "new and different" from the original petition is not persuasive. As such, MCR 3.977(F) did not apply, and the trial court did not abuse its discretion in admitting the evidence in question.

Next, respondent argues the trial court clearly erred in finding that the requirements of MCL 712A.19b(3)(c)(*i*), (g) and (j) were proven by clear and convincing evidence. We disagree.

MCL 712A.19b(3)(c)(*i*), (g), and (j) provide that termination is warranted if:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *
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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Although a petitioner generally "has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Here, the conditions that led to adjudication continued to exist, and the trial court properly found that there was no likelihood that respondent would rectify the conditions in a reasonable time, considering the age of the children. See MCL 712A.19b(3)(c)(*i*). The conditions that led to adjudication included respondent's failure to protect her children from her infant child's abusive father. The record established that respondent failed to substantially

comply with or benefit from the services that were offered to address the circumstances leading to the adjudication. Specifically, respondent failed to make adequate progress in the areas of parenting, housing, employment, and mental health. Moreover, serious concerns were raised at trial that respondent continued to have contact with her abusive former boyfriend, notwithstanding the fact that he had abused their infant child. The abusive former boyfriend himself admitted he saw respondent, thus resulting in a violation of his probation. Other evidence presented at trial supported the trial court's conclusion that, not only was respondent continuing to see her abusive former boyfriend, but also that he was in contact with the children. It was entirely reasonable, therefore, for the trial court to find clear and convincing evidence that the conditions which led to adjudication continued to exist. See MCL 712A.19b(3)(c)(*i*).

In addition, the evidence clearly showed that, without regard to intent, respondent failed to provide proper care and custody for the children, and that there was no reasonable expectation that she would be able to do so within a reasonable time, considering the age of the children. See MCL 712A.19b(3)(g). Respondent acknowledged she had impulsive tendencies and was currently unable to provide for her children on her own. She acknowledged that she was frequently late for or missed numerous appointments with mental health professionals and parenting coaches. She was unable to secure and keep adequate employment to support her family. Most significantly, she put her own need to see her abusive former boyfriend above the safety of her children. We agree with the trial court that this was illustrative of respondent's low level of commitment to prioritize the needs of her children, and thus indicative of her inability to provide for their proper care and custody.

Given respondent's inability to properly care for the children, including most notably her errors of judgment in placing her children in contact with her abusive former boyfriend, the trial court also properly found that there was a reasonable likelihood that the children would be harmed if returned to respondent's home. See MCL 712A.19b(3)(j). For these reasons, we conclude that the trial court did not clearly err in finding that three statutory grounds for termination were proven by clear and convincing evidence.

Lastly, respondent argues that the trial court erred in failing to consider the children's placement with their grandmother as a factor weighing against termination. Respondent asserts that, if the trial court had properly considered this factor, it could not have determined termination was in the children's best interests. Because the trial court failed to consider the fact that the children were placed with a relative when making its best interest determination, we vacate the best interest portion of the trial court's analysis and remand this case for further proceedings.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). When assessing a child's best interests, a child's placement with relatives is an "explicit factor" that trial courts must consider. *In re Mason,* 486 Mich at 164. A child's placement with relatives weighs against termination. *Id.*, citing MCL 712A.19a(6)(a). "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest

determination and requires reversal." *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

In this case, in making its findings, the trial court failed to specifically address the fact that the children were living with their maternal grandmother. The trial court should have, but did not, consider the fact that the children were placed with respondent's mother when determining whether termination was in the children's best interests. Accordingly, we vacate the trial court's best interest analysis and we remand with instructions that the trial court undertake a best interest determination that includes consideration of this factor. See *id.* at 43-44.

Affirmed in part, vacated in part, and remanded for further proceedings regarding the children's best interests. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter